1986

The State of Utah v. Mark Renfro : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Appellant, vs. MARK RENFRO, Defendant-Respondent,	Case No. 860101 Category No. 2

BRIEF OF DEFENDANT-RESPONDENT

APPEAL FROM AN ORDER OF DISMISSAL IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, THE HONORABLE CULLEN Y. CHRISTENSEN, JUDGE, PRESIDING.

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, Plaintiff-Appellant, vs. MARK RENFRO, Defendant-Respondent,	Case No. 860101 Category No. 2

STATEMENT OF ISSUES PRESENTED ON APPEAL

The sole issue on appeal is whether the trial court was correct in dismissing the charge of arranging to distribute a controlled substance for value against the defendant.

STATEMENT OF THE CASE

The defendant, Mark Renfro, was charged with arranging to distribute a controlled substance for value, a third-degree felony, in violation of Section 58-37-8(1)(a)(iv), Utah Code Annotated (Supplement 1983) (House Bill No. 241, Amendment effective April 28, 1986) (R. 14). After a bench trial, the Court granted the defendant's motion to dismiss (R. 43-45). The State of Utah appealed the Fourth Judicial Court of Utah County, State of Utah Order of Dismissal.

STATEMENT OF FACTS

On March 28, 1985, two undercover officers from Provo City Police Department went to the defendant's residence in Orem Utah. There they talked to the defendant about purchasing marijuana. The defendant went into his bedroom and retrieved a small bag of

marijuana from his shaving kit and returned shortly thereafter. Officer Guynn handed the defendant $100.00 and received two baggies of marijuana each containing one-half ounce of marijuana. After the transaction was completed, the officers left the defendant's residence. (R. 60-62)

At the trial, the Court received the evidence presented by the State and the defendant did not put on any evidence. (R. 66). After hearing argument, the Court took the matter under advisement. It subsequently issued a revised Memorandum Decision and Order granting Defendant's request for dismissal on the 29th day of January, 1986. (A copy of the Court's decision is contained in Appendix A in the Respondent's Addendum). The Court stated beginning at Paragraph 4 of its Decision:

> The Court is persuaded that the evidence establishes conduct which is clearly in violation of the statute of the State of Utah governing the distribution for value of a controlled substance (Section 58-37-8(1)(a)(ii), as defendant contends, and that the defendant should have been charged under the offense rather than with arranging to distribute a controlled substance for value (Section 58-37-8(1)(a)(iv)...Because of the State's failure to properly charge the defendant with the offense of distribution for value rather than arranging, the Court grants the defendant's Motion to Dismiss...

SUMMARY OF ARGUMENT

The trial court's Order should be upheld because the conduct complained of by the State clearly was in violation of Section 58-37-8(1)(a)(ii), Utah Code Annotated, (1953) as amended, or distribution for value and not pursuant to Section 58-37-8(1)(a)(iv) (Supplement 1983) or arranging. Further, the Supreme Court has misinterpreted the meaning of the arranging statute pursuant

to Section 58-37-8(1)(a)(iv) (Supplement 1983).

INTRODUCTION TO ARGUMENT

The defendant-respondent agrees with the State that this brief should be read in conjunction with the State's brief filed in two other cases having related issues--State v. Fixel, Case No. 860151 and State v. Fixel, Case No. 860173. Further it should be pointed out that the phrase "instead of" was inserted for the phrase "in lieu of" in Section 58-37-8(1)(a)(iv), Utah Code Annotated, (1953), as amended, which became effective April 28, 1986, and therefore, the arranging statute's meaning has not been changed.

ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY DISMISSED THE CHARGE FILED AGAINST DEFENDANT.

It goes without saying and according to 73 Am. Jur. 2nd. Statutes, Section 295:

> Penal statutes are construed with such strictness as to safeguard the rights of the defendant. If the statute contains a patent ambiguity and admits of two reasonable and contradictory constructions, that which operates in favor of a party accused under its provisions is to be preferred. Moreover, penal statutes are not to be extended in their operation to persons, things, or acts not within their descriptive terms, or the fair and clear import of the language used. Nothing can be read into penal statutes by implication. The fact that the statute may be easily evaded furnishes no excuse for supplying by judicial construction that which is palpably omitted therefrom. These rules prevail even though the court thinks that the legislature ought to have made the statute more comprehensive. The application of the rule of strict construction of criminal statutes is especially appropriate where intent alone is made the basis of the crime.

The Court's ruling, however, should be upheld for more basic

reasons. The defendant joins with the State in its brief filed *in the cases of Fixel above-mentioned and respectfully request* the Court to overrule State vs. Hicken, 659 P.2d 1038 (Utah 1983), State v. Harrison, 601 P.2d 922 (Utah 1979) and State v. Onevaris, 674 P.2d 103 (Utah 1983).

The dispute revolves around the construction of Section 58-37-8(1)(a)(iv), Utah Code Annotated, (Supplement 1983), as amended, and its meaning.

The Utah Supreme Court has divided the statute into two distinct crimes. That is, the Utah Supreme Court had read the statute as follows:

> To agree, consent, offer, or arrange to distribute or dispense a controlled substance for value. To negotiate to have a controlled substance distributed or dispensed for value and distribute, dispense, or negotiate the distribution or dispensing of any other liquid, substance, or material in lieu of the specific controlled substance so offered, agreed, consented, arranged, or negotiated.

That is, the Supreme Court has made two separate crimes out of this statute by making the alternation i.e. "or," be the prominent point of division. The Respondent's position is that such a division is improper and that the proper division must be made at the conjunctive, i.e., "and," thereby reading the statute as one sentence as is set forth in the code which only proscribes one activity. In other words, the Respondent's position is that it is only a violation of Section 58-37-8(1)(a)(iv), Utah Code Annotated, (1953), as amended, if there is both an arrangement to distribute a controlled substance and then in lieu (or instead of as the law presently reads) the controlled substance so arranged

to be distributed a substitution is made for the controlled substance originally arranged to be distributed, e.g., marijuana is arranged to be distributed, but some other substance in lieu or instead thereof is actually distributed.

According to K. Carter, A CONTEMPORARY INTRODUCTION TO LOGIC (1977), at 46-47:

> "Conjunction. Connecting two statements by inserting 'and' between them produces a conjunction, and each of the connecting statements is a conjunct. Consider these two statements: 15:3 Peter Parker is a student at Cornell. 15:4 Spiderman is now in Ithaca. The following statement is their conjunction: 15:5 Peter Parker is a student at Cornell and Spiderman is now in Ithaca. If both (15:3) and (15:4) are true (15:5) is true: if either conjunct is false, (15:5) will be false also....Alternation. Connecting two statements by inserting 'or' between them produces an alternation, and each of the connected statements is an alternative. If we connect (15:3) and (15:4) with 'or' instead of with 'and' we have this alternation: 15:6 Peter Parker is a student at Cornell or Spiderman is now in Ithaca. If either (15:3) or (15:4) is true, (15:6) is true; if both alternatives are false (15:6) will be false also." [Emphasis in the original].

If the letter "A" represents the phrase "To agree, consent, offer," if the letter "B" represents the phrase "arrange to distribute or dispense a controlled substance for value," if the letter "C" represents the phrase "to negotiate to have a controlled substance distributed for value or dispense for value," and the letter "D" represents the phrase "distribute, dispense, or negotiate the distribution or dispensing of any other liquid, substance, or material in lieu of the specific controlled substance so offered, agreed, consented, arranged, or negotiated," then such representations reads (A or B or C and D). The Supreme Court has grouped the aforesaid letters as [(A or B)

or (C and D)]. The Respondent's position is that the logical construction and grouping should be read [(A or B or C) and D]. Therefore, the construction of the grouping will determine whether or not a crime has been committed. That is, under the Supreme Court's theory if either the letters (A or B) are true a crime has been committed, but the defendant's position is that (A or B or C) must be true and D must also be true before a crime has been committed.

It can readily been seen by looking at the statute the Respondent's postion is correct. The last phrase reads "of any other liquid, substance, or material in lieu of the specific controlled substance so offered, agreed, consented, arranged, or negotiated." [Emphasis added]. If the Supreme Court's position were correct this phrase would read "material in lieu of the specific controlled substance so negotiated." [Emphasis added]. It can be seen that as the statute presently reads, the words "so offered, agreed, consented, arranged, or negotiated," refer to the phrases identified as (A or B or C) as previously identified and not merely to the phrase previously identified by the letter C.

The California case of People v. Brown, 357 P.2d 1072 (1960) attached hereto as Appendix B dealt with the specific problem in issue. Footnote 1 set forth in the Brown case has been renumbered as Section 11352 of the Uniform Controlled Substance Act of the California Code and is attached hereto as Appendix C. Footnote 2 set forth in the Brown case has been renumbered as

Section 11355 of the Uniform Controlled Substance Act of the California Code and is attached hereto as Appendix D.

The Brown case dealt with a violation of what is now Section 11352 of the California Code. It should be noted that Utah does not have a statute similar to Section 11352 of the California Code, but Section 58-37-8(7) Utah Code Annotated (1953), as amended, deals with conspiracies and attempts. It also does not appear that the California Code specifically deals with conspiracies and attempts under a separate section as does the Utah Code.

It can be seen that the statute dealt with in the Brown case under the footnote 2 is now Section 11355 of the California Code and that Section 11355 of the California Code is the same statute as Section 58-37-8(1)(a)(iv), Utah Code Annotated (1953), as amended.

The Court in Brown noted at page 1074 with reference to the statute which has now been renumbered Section 11355:

> Section 11503 [now Section 11355] makes it a crime to offer to sell a narcotic and then deliver a substitute. Proposed Section 11509...would have made it a crime to offer to sell a narcotic coupled with the acceptance of money, even though there was no delivery of anything.
>
> In recommending the passage of Section 11503, [now Section 11355], the subcommittee stated: [this section] will be entirely new law. This will cover the individual who agrees to sell, furnish, transport, or give away any narcotic, and then delivers some other liquid, substance or material. These individuals are known to be in a position to violate the law; but, for some reason, they may feel that they are dealing with a law enforcement officer and thus deliver tobacco, water, or some other substance with the result that they have had the intent to commit the crime but are testing out the officer.

> At the present time nothing can be done to that person, except to charge [him] with 'bunco.' .... The subcommittee thus made clear its view that Section 11501 [now Section 11352] did not encompass an offer to sell a narcotic and subsequent delivery of a substitute.

The point made in the Brown case is that Section 11352 of the California Code deals with an offer to sell while Section 11355 of the California Code makes it a crime to offer to sell a narcotic and the delivery of a substitute.

Additionally, the Brown case notes that specific intent is required as an essential element of offering to make a sale in violation of Section 11352 of the California Code. Although the issue with regard to the intent required for a violation of Section 11355 of the California Code has not been definitely decided by the California Supreme Court, the case of People v. Lechlinski, 131 Cal. Rptr. 701, 60 Cal. App. 3d 766 (1976) states with reference to whether specific intent or general intent is necessary for a violation of Section 11355 of the Health and Safety Code, of the California Code that:

> We therefore hold that it is immaterial to a violation of Section 11503 (now 11355) whether the defendant either before or at the time of delivery of the non-narcotic substance, intends to deliver a narcotic or some innocuous material. this section is violated if there is an offer of a narcotic and subsequent delivery of a non-narcotic substance.

It, therefore, appears that Section 11352 of the California Code requires specific intent in order for there to be a violation while Section 11355 of the California Code only requires general intent. At any rate, Utah does not have a

statute similar to Section 11352 of the California Code and it would seem strange to require specific intent for a violation of Section 58-37-3(1)(a)(iv) in some circumstances while only requiring general intent in others. Additionally, in our case, the defendant made a direct sale and did not offer to sell one thing and then sell something else in lieu thereof or instead of.

The California case of People v. Shepard, 337 P.2d 214 (1959) dealt with the defendant's claim with what is now Section 11355 of the California Code was unconstitutional as being vague, uncertain, and unintelligible. The Court in Shepard noted at page 127:

> A reading of the Section answers the assertions of the appellant to the effect that it is vague, uncertain and unintelligible. Men of common intelligence do not have to guess at what it means.... There is a reasonably adequate disclosure of the legislative intent regarding the evil to be combatted in language giving fair notice of practices to be avoided....A reading of the Section discloses that it is a crime for a person to agree to sell a narcotic to someone, and then to deliver instead a non-narcotic substance.

The Utah Supreme Court cannot place two interpretations on the arranging statutes if it intends to uphold the arranging statute as constitutional. Either the statute is vague, uncertain, and unintelligible or it means what it says, i.e., to offer to sell a narcotic and deliver a substitute instead. Also note other states have statutes similar to Utah and other states also do not have a statute similar to Section 11352 of the California Code. See Section 453.323 of the Nevada Revised Statutes attached hereto and incorporated by reference, as Appendix E. It should

be pointed out that the apparent reason is that Utah and Nevada has an attempt and conspiracy statute which California does not specifically have.

Reading Section 58-37-8(1)(a)(iv), Utah Code Annotated (1953), as amended, in accordance with the Supreme Court's prior interpretation makes Sections 58-37-8(1)(a)(ii) and 58-37-8(7), Utah Code Annotated (1953), as amended, superfluous and would additionally appear to cause equal protection violations under the 14th Amendment of the United States Constitution together with Utah Case Law.

California has consistently interpreted Section 11355 of West's Ann. Health and Safety Code as requiring an offer or arrangement to sell a narcotic and subsequent delivery of a substitute and the Utah Court must do the same as being the clear meaning of the statute. People v. Lechlinski, 131 Cal. Rptr. 201, 60 Cal. App. 3d 766 (1976); People v. Medina, 103 Cal. Rptr. 721, 27 Cal. App. 3d 473 (1972); People v. Ernst, 121 Cal. Rptr. 857, 48 Cal. App. 3d 785 (1975).

The State of Utah argued in the District Court in the above-entitled case:

> MR. BARRY: Your Honor, if I may speak simply to defendant's contention. If you'd look at the Information itself, you'll be able to read that the defendant is charged with having knowingly and intentionally agreed or that he did knowingly and intentionally agree, offer, consent, arrange or negotiate to distribute for value marijuana, a Schedule I controlled substance.
>
> The crime we are involved here with is: Did he agree to sell it? Did he consent to sell it? Did he offer to sell it? It makes no sense at all to say the defendant is not guilty of this crime because he in fact delivered the marijuana. What's in marijuana itself shows in the delivery of the marijuana, shows itself that he meant it when he said: Yes, I'll sell you a hundred dollars worth of marijuana. The crime

itself is the agreement to distribute the marijuana. Delivery of the marijuana shows that he did intentionally make that agreement, that it was a true agreement and that he meant to follow through with it, your Honor. It makes no sense at all to claim: hey, I'm not really guilty because I actually gave him the marijuana after I got the money. That was evidence that there was in fact an agreement.

The only way the defendant's contention could hold up would be in another scenario; for example, some party shows up and delivers the marijuana with whom none of the negotiations were made. The agreement in this case was made specifically between the undercover officers and this man, namely, that they would sell a hundred dollars worth of marijuana.

THE COURT: What do you characterize as "distributing for value," what constitutes that crime?

MR. BARRY: This case could be charged either way, your Honor. (R. 69-70).

The difficulty with the prosecution's approach of course is that by reading the so called "arranging statute" in such a way is that it virtually makes the remainder of Section 58-37-8, Utah Code Annotated (1953), as amended, superfluous. Such a reading would make the "arranging statute" overly broad, vague, uncertain and unintelligible and therefore unconstitutional.

The possibilities are really endless. Is it a felony for a person to negotiate the sale of marijuana to himself from police? If so what is the purpose of the misdemeanor possession section of the code, Section 58-37-8(2)(a)(i), Utah Code Annotated (1953), as amended?

The State's position in the District Court was all that was necessary to prove the crime was "did [the defendant] agree to sell it." (R. 69). If this were the case and without more, the penalty revolves around what is offered for sale rather than what is sold. That is, if a person offers to sell marijuana, the penalty is different than the penalty for offering to sell

cocaine. And all the state would have to prove through the testimony of an officer was that a defendant agreed, consented, or offered to sell one controlled substance as opposed to another. No sale need even take place. How is a defendant supposed to defend against such a charge as a practical matter on such evidence? Does this mean if some eighteen year old defendant tells an officer on Center Street in Provo, Utah, where he can buy marijuana, that he is guilty of a third degree felony without more?

Finally, since the resolution of this case does not involve a Federal or State constitutional issue, its application should be prospective only. Andrews v. Morris, 677 P.2d 81 (Utah 1981).

It is the Respondent's position that the Supreme Court should review its previous decisions regarding Section 58-37-8(1)(a)(iv), Utah Code Annotated, (1953), as amended, and rule as Judge Bullock did in State v. Jacobson, Fourth Judicial District Court, Utah County, State of Utah, Case No. 7062 hereto attached as Appendix "F" in order to avoid further confussion in the trial court.

It is the Respondent's position that this ruling should be perspective and that the Supreme Court should set forth a rule in conformity with the case of State v. King, 564 P.2d 767 (Utah, 1976). In the case of King, the defendant was convicted of the offense of selling marijuana, and the Court noted, "it is recognized that if a person is acting as a law enforcement officer or acts as agent in the sale or purchase of drugs as part of the law enforcement duties, he would not be guilty of the

offense charged. The test should be whether any defendant is acting knowingly or unknowingly as an agent for a police officer or acting as an agent for a person who is selling drugs. In the event a person is merely acting as an agent for the police, either knowingly or unknowingly, and does not gain thereby, he should not be convicted of a felony charge. On the other hand, in the event that a person is acting as a go-between or agent for a person who sells drugs he should obviously be convicted of a felony. However, while an individual defendant should not be applauded for telling third persons where they can obtain drugs, he should not be convicted of a felony unless he is actively involved.

CONCLUSION

The District Court for its Order of Dismissal should be upheld and the Utah Supreme Court should reevaluate Section 58-37-8(1)(a)(iv), Utah Code Annotated (1953), as amended, in accordance with the foregoing in order to avoid further confusion in this matter.

DATED this 19th day of September, 1986.

GREGORY M. WARNER
Attorney for Defendant-Respondent

CERTIFICATE OF MAILING

I hereby certify that I mailed four true and correct copies of the foregoing instrument to Mr. David L. Wilkinson, Attorney General, 236 State Capital, Salt Lake City, Utah 84114, this 19th day of September, 1986, postage prepaid.

GREGORY M. WARNER

ADDENDUM

APPENDIX "A"

IN THE FOURTH JUDICIAL DISTRICT COURT
FOR UTAH COUNTY
STATE OF UTAH

STATE OF UTAH,	:	REVISED MEMORANDUM DECISION AND ORDER
Plaintiff,	:	GRANTING DEFENDANT'S REQUEST FOR DISMISSAL
vs.	:	
MARK RENFRO,	:	Case No. 9831
Defendant.	:	

This matter came regularly before the Court for trial on December 30, 1985. The defendant had waived his right to trial by jury; the trial was held before the bench. The State of Utah was represented by Deputy County Attorney Kent M. Barry, and the defendant was present and represented by counsel Gregory M. Warner. The Court heard the evidence presented by the State, the defendant offering no evidence and took the matter under advisement. The Court having reviewed the evidence and arguments of counsel, its previous memorandum decision, and having further reconsidered the motions and arguments of counsel, the Court hereby enters the following findings and makes the following order.

FINDINGS

1. The Court finds from the evidence shown that the State's witness, Jim Guynn, and another individual went to the defendant's house in Orem, Utah County , Utah, on March 28, 1985, for the purpose of purchasing marijuana.

2. That while there, discussions were held, the results of which were that the officer gave two fifty dollar bills to the defendant in exchange for two small bags of marijuana, which the defendant retrieved from his bedroom inside the residence.

3. The defendant was charged with the offense of Arranging to Distribute a Controlled Substance for Value, and trial was held on that charge. After the parties had both rested their respective cases, the defendant moved to dismiss the charge because of the State's failure to charge Distribution of a Controlled Substance for Value, which he contended was the specific charge governing such conduct, and the State made no effort to amend the Information to that charge.

4. The Court is persuaded that the evidence establishes conduct which is clearly in violation of the statutes of the State of Utah governing the Distribution for Value of Controlled Substances (Section 58-37-8(1)(a)(ii)), as defendant contends, and that the defendant should have been charged under that offense rather than with Arranging to Distribute a Controlled Substance for Value (Section 58-37-8(1)(a)(iv).

ORDER

Because of the State's failure to properly charge the defendant with the offense of Distribution for Value rather than Arranging, the Court grants the defendant's motion to dismiss and hereby orders that the charge against the defendant in this case, Arranging to Distribute a Controlled Substance for Value, be dismissed against this defendant and that he be discharged.

DATED this 29 day of January, 1986.

BY THE COURT:

Cullen Y. Christensen

CULLEN Y. CHRISTENSEN
DISTRICT COURT JUDGE

APPENDIX "B"

PEOPLE, Respondent,
v.
Joseph BROWN, Appellant.
Cr. 6655.

Supreme Court of California
In Bank.
Dec. 22, 1960.

Prosecution for offering to sell heroin. From adverse judgment of the Superior Court, Los Angeles County, William E. Fox, J., the defendant appealed. The Supreme Court held that admission by defendant that he had the stuff and was on his way back but that the police rousted him and he had to get rid of it, plus absence of any evidence that his offer was false, was sufficient to sustain his conviction.

Judgment and order denying motion for new trial affirmed.

Opinion, 3 Cal.Rptr. 203, vacated.

1. Poisons ⇐4

In prosecution for offering to sell narcotics, a specific intent to sell a narcotic is an essential element of the crime of offering to make such a sale. West's Ann. Health & Safety Code, § 11501.

2. Poisons ⇐4

Statute making it a crime to offer to sell narcotics and to furnish a substitute does not encompass an offer to sell a narcotic and the subsequent failure to deliver anything. West's Ann.Health & Safety Code, § 11503.

3. Statutes ⇐216

Legislative subcommittee's interpretation of an existing statute is not conclusive.

4. Poisons ⇐4

Under statute making it a crime to offer to sell narcotics, the requirement of a direct, unequivocal act toward a sale necessary for an attempt to make a sale is not an implied element of an offer to sell. West's Ann.Health & Safety Code, §§ 11500, 11501, 11503.

5. Poisons ⇐9

In prosecution for offering to sell heroin, admission by defendant that he had the stuff and was on his way back but that the police rousted him and he had to get rid of it, plus absence of any evidence that his offer was false, was sufficient to sustain his conviction. West's Ann.Health & Safety Code, §§ 11501, 11503.

Gerald L. Rosen, Los Angeles, for appellants.

Stanley Mosk, Atty. Gen., and William E. James, Asst. Atty. Gen., for respondent.

PER CURIAM.

The trial court, sitting without a jury, found defendant guilty of offering to sell narcotics in violation of section 11500 (now renumbered and hereafter called section 11501) of the Health and Safety Code. It also found that he was previously convicted of attempted robbery, denied his motion for new trial, and sentenced him to imprisonment in the state penitentiary for the term prescribed by law. Defendant appeals.

The public defender represented defendant at the trial, but did not undertake to do so on appeal. See Gov.Code, § 27706. Defendant requested the District Court of Appeal, Second District, Division Three, in which the appeal was pending, to appoint an attorney to represent him, claiming that he was without funds to employ counsel. The court made an independent investigation of the record, determined that representation by counsel would be of no benefit to defendant or to the court, and denied the request. See People v. Hyde, 51 Cal.2d 152, 154, 331 P.2d 42. Defendant prepared and filed a brief in propria persona. The court affirmed the judgment. People v. Brown, Cal.App., 3 Cal.Rptr. 203. We granted defendant's petition for hearing in this court and appointed counsel to represent him.

Officer Walton, an undercover narcotics agent, had arranged to buy heroin from an unidentified person and was awaiting delivery when defendant walked up to him and

asked if he were a policeman. He replied that he was not. When defendant then asked him what he was waiting for, he replied that he was expecting a delivery of heroin. Defendant then left.

While sitting in a bar the following afternoon, Officer Walton saw defendant on the street and called to him, and defendant entered the bar. Officer Walton testified: "I told him that I would like to know who put the jacket on me, meaning who said that I was a policeman; and the defendant stated that he couldn't tell me that, but that he didn't think I was a policeman because I didn't look the type and I told him that I wanted to get some stuff, meaning heroin; and he stated that he could get it for me but if I turned him in, well, the people around that area would know who burned him—meaning had him arrested." Officer Walton told defendant that he did not want to get burned again, meaning that he did not want to part with his money without receiving narcotics in return. Defendant answered that if Officer Walton wanted "it," he would have to take some risks. Officer Walton then gave defendant $9 and defendant left. Officer Walton waited for some time, but defendant did not return.

He saw defendant again three or four days later and asked him why he had not returned to the bar. Defendant answered "that he had it and he was on his way back but the police rousted him and he had to get rid of it." He again encountered defendant about a week and a half later and called to him "[t]hat was a pretty dirty deal you pulled on me the other day." Defendant replied that he would speak to him later. He did not see defendant again until his arrest. Defendant did not deliver heroin or any other substance to Officer Walton in return for the $9.

[1] In his briefs filed in the District Court of Appeal, defendant contends that a specific intent to sell narcotics is an essential element of the crime of offering to sell narcotics under section 11501 of the Health and Safety Code [1] and that this intent cannot be inferred from the making of the offer alone. He asserts that the making of such an offer is equally attributable to an intent to obtain money by false pretenses. His counsel makes the additional contention that by proscribing offers to sell the Legislature in effect proscribed one form of attempts to sell and that therefore we must look to the law of attempts to determine whether an oral offer to sell constitutes an attempt to sell. He asserts that the oral offer and the taking of the money were only preparation to making a sale and that neither was a direct, unequivocal act toward a sale. See People v. Gallardo, 41 Cal.2d 57, 66, 257 P.2d 29, and cases cited. Since in his view such an act is an essential element of the corpus delicti of an offer to sell within the meaning of section 11501, it cannot be proved by defendant's extrajudicial admission standing alone that "he had it and he was on his way back but the police rousted him and he had to get rid of it." See People v. Duncan, 51 Cal.2d 523, 528, 334 P.2d 858; People v. McMonigle, 29 Cal.2d 730, 738, 177 P.2d 745.

1. Section 11501 provides: "[e]xcept as otherwise provided in this division, every person who transports, imports into this State, sells, furnishes, administers or gives away, or offers to transport, import into this State, sell, furnish, administer, or give away, or attempts to import into this State or transport any narcotic other than marijuana except upon the written prescription of a physician, dentist, chiropodist, or veterinarian licensed to practice in this State shall be punished by imprisonment in the county jail for not more than one year, or in the state prison from five years to life. "If such a person has been previously convicted of any offense described in this division or has been previously convicted of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as an offense described in this division, the previous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned in the state prison from 10 years to life."

Both defendant's and his counsel's contentions are consistent with the position taken by the Subcommittee on Narcotics of the Assembly Interim Committee of the Judiciary in 1953 when it proposed the adoption of two new sections of the Health and Safety Code, only one of which was enacted. Section 11503 makes it a crime to offer to sell a narcotic and then deliver a substitute.[2] Proposed section 11509 (section 10 of Assembly Bill No. 2243, 1953 Session) would have made it a crime to offer to sell a narcotic coupled with the acceptance of money, even though there was no delivery of anything.[3]

[2] In recommending the passage of section 11503, the Subcommittee stated: "[this section] will be entirely new law. This will cover the individual who agrees to sell, furnish, transport, or give away any narcotic, and then delivers some other liquid, substance or material. These individuals are known to be in a position to violate the law; but, for some reason, they may feel that they are dealing with a law enforcement officer and thus deliver tobacco, water, or some other substance with the result that they have had the intent to commit the crime but are testing out the officer. At the present time nothing can be done to that person, except to charge [him] with 'bunco' Under this statute, it provides a penalty of not more than one year in the county jail or in the state prison for 10 years" The Subcommittee thus made clear its view that section 11501 did not encompass an offer to sell a narcotic and subsequent delivery of a substitute. A fortiori it would not encompass an offer to sell a narcotic and subsequent failure to deliver anything, which proposed section 11509 envisaged.

[3] Whether the Subcommittee's view was based on the theory that an offer alone to sell a narcotic is insufficient evidence of a specific intent to make such a sale or on the theory that offer means attempt and that some additional act is required to constitute an attempt does not appear In any event, the Subcommittee's interpretation of the existing statute is not conclusive. Even if it is assumed that by enacting section 11503 the Legislature impliedly excluded the conduct therein proscribed from the more inclusive language of section 11501, it did not affect the scope of section 11501 in relation to defendant's conduct in this case.

[4, 5] We agree with defendant's contention that a specific intent to sell a narcotic is an essential element of the crime of offering to make such a sale under section 11501. See Pen Code, § 20; Matter of Yun Quong, 159 Cal. 508, 514–515, 114 P. 835, People v. Winston, 46 Cal 2d 151, 158; People v. Vogel, 46 Cal 2d 798, 801, 299 P 2d 850. In view, however, of defendant's subsequent admission that "he had [the stuff] and he was on his way back but

2. Section 11503 provides that "[e]very person who agrees, consents, or in any manner offers to unlawfully sell, furnish, transport, administer, or give away any narcotic to any person, or offers, arranges, or negotiates to have any narcotic unlawfully sold, delivered, transported, furnished, administered, or given to any person and then sells, delivers, furnishes, transports, administers, or gives, or offers arranges, or negotiates to have sold delivered, transported, furnished, administered, or given to any person any other liquid, substance, or material in lieu of any narcotic shall be punished by imprisoment in the county jail for not more than one year or in the state prison for not more than 10 years"

3. Proposed section 11509, as amended March 9, 1953, read "[e]very person who agrees, consents, or in any manner offers, to sell, deliver, furnish, transport, administer, or give, or arranges or negotiates to have sold, delivered, furnished, transported, administered, or given to any person any narcotic in violation of any provision of this division and accepts any money, thing of value, or other consideration in full or partial payment is guilty of a felony, and upon conviction thereof shall be confined in the county jail for not less than 60 days nor more than one year, or in the state prison for not more than 5 years"

the police rousted him and he had to get rid of it," and the absence of any compelling evidence that defendant's offer was false, the trial court could reasonably conclude that defendant meant what he said when he stated to the officer that for $9 "he would get it for me. * * * He would get the stuff for me." Moreover, there is nothing in section 11501 to support the contention that an offer to sell means an attempt to sell, for it proscribes both "offers to transport, import into this State, sell, furnish, administer or give away" and "attempts to import into this State or transport any narcotic * * *." By thus distinguishing between offers and attempts the Legislature made clear that the requirement of a direct, unequivocal act toward a sale necessary for an attempt to make a sale is not an implied element of an offer to sell.

The judgment and the order denying the motion for new trial are affirmed.

TRAYNOR, Justice (concurring).

I concur in the judgment. It is my opinion, however, that the holding in People v. Hyde, 51 Cal.2d 152, 154, 331 P.2d 42, should be expanded to require the appointment of counsel on appeal for all indigent defendants convicted of felonies.[1]

1. The problem has attracted nation-wide attention. The subcommittee to study defender systems of the Association of the Bar of the City of New York and the National Legal Aid Association concluded in their report, Equal Justice for the Accused 61 (Doubleday, 1959) that "[i]n addition to affording early representation, any defender system should make provision for the continuance of representation through appeal in appropriate cases. An appeal when grounds exist is an inseparable part of the process through which the individual's guilt or innocence of the charges brought against him by the state is established. Counsel is needed to assist with the determination of whether an appeal should be taken and, if an appeal is taken, to prepare and present it."

State practice varies. Two states require the appointment of counsel on appeal in all felony cases. (Indiana: State ex rel. White v. Hilgemann, 218 Ind. 572, 578, 34 N.E.2d 129; State ex rel. Grecco v. Allen Circuit Court, 238 Ind. 571, 575, 153 N.E.2d 914; Wisconsin: Wis. Stat.Ann. § 957.26(3), [if the court is satisfied that "review is sought in good faith and upon reasonable grounds"].) In New York the appointment of counsel on appeals turns upon whether the indigent defendant has a copy of the trial minutes. If he does, no counsel is appointed (People v. Breslin, 4 N.Y.2d 73, 86–87, 172 N.Y.S.2d 157, 149 N.E.2d 85); otherwise appointment is mandatory (People v. Kalan, 2 N.Y.2d 278, 280, 159 N.Y.S.2d 480, 140 N.E.2d 357; People v. Pitts, 6 N.Y.2d 288, 292–293, 189 N.Y.S.2d 650, 160 N.E.2d 523). Wyoming places discretion in the Supreme Court to appoint counsel for indigent defendants "in any criminal matter or proceeding before said supreme court." Wyo.Stats.1957 § 7–8. Several states appoint counsel at the trial who has discretion to appeal at public expense. (Connecticut: State v. Klein, 95 Conn. 451, 453, 112 A. 524 [public defender]; State v. Zukauskas, 132 Conn. 450, 451–452, 45 A.2d 289 note; Iowa: Iowa Code Ann. tit. 36 § 775.5 (1959 Pocket Part), Tomlinson v. Monroe County, 134 Iowa 608, 610, 112 N.W. 100; Michigan: Mich.Stat.Ann. § 28.1254, Comp.Laws 1948, § 775.17; Minnesota: Minn.Stat. Ann. § 611.07, subd. 2 (1959 Pocket Part) [Review must be sought "in good faith and upon reasonable grounds." The provision may apply only when trial counsel was appointed by the court, cf. State v. Coursolle, 255 Minn. 384, 390, 97 N.W.2d 472]; Mississippi: Miss.Code Ann.1942 § 2505 [capital cases only]; Nevada: Nev.Rev.Stat. §§ 177.065, subd. 2, 7.260; Pennsylvania: Penn.Stat.Ann. tit. 19 § 1232.) Other states require appointment of counsel on appeal only in capital cases. (Alabama: Ala.Code tit. 15 § 382(5) (1955 Pocket Part), [applied but not discussed in Monk v. State, 258 Ala. 603, 64 So.2d 588]; Florida: Fla.Stat.Ann. § 909.21 (1959 Pocket Part), [applied, McNeal v. Culver, Fla., 113 So.2d 381, 383]; Georgia: Ga.Code Ann. § 27–3002 (1958 Pocket Part); Illinois: Ill.Rev.Stat.1959, ch. 38 § 730a; Kansas: Gen.Stat. of Kan. § 62–1304 (1959 Supp.) (first degree murder only); Nebraska: Rev.Stat. of Neb.1943 §§ 29–1803, 29–1804 (1959 Cum.Supp.); North Carolina: Gen.Stat. of No.Car. § 15–181; Oklahoma: Noel v. State, 17 Okl.Cr. 308, 318–322, 188 P. 688; Oregon: Ore. Rev.Stat. § 138.420 (1959 Replacement); cf. Anonymous, 76 Me. 207 (1st case, 1884).) Three states refuse to appoint counsel on appeal. Rhode Island: State v. Hudson, 55 R.I. 141, 153, 179 A. 130,

The question calls for resolution even though we appointed counsel to represent defendant in this court. The question cannot remain in abeyance. This very case illustrates the recurring practice of the District Court of Appeal, Second District, Division Three, of referring the question of the appointment of counsel to the local bar association committee (see People v. Logan, 137 Cal.App.2d 331, 332, 290 P.2d 11) and the consequent countervailing practice of this court to then grant a hearing, even on its own motion, whenever there has been no appointment of counsel. There would be no end to such wasteful procedure were the question deemed moot each time this court granted a hearing and appointed counsel. The question should be settled in the interest of effective appellate court administration. See Almassy v. L. A. County Civil Service Com., 34 Cal.2d 387, 390, 210 P.2d 503; Walling v. Mutual Wholesale Food & Supply Co., 8 Cir., 141 F.2d 331, 334–335; People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, 772, 30 A.L.R.2d 1132; State ex rel. Smith v. Smith, 197 Or. 96, 252 P.2d 550, 563; 103 U. of Pa.L.Rev. 772, 783, 787–793; 132 A.L.R. 1185, 1186.

In Griffin v. People of State of Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, the Supreme Court of the United States held that a state may not deny to a defendant, on the sole ground that he cannot pay for it, a stenographic transcript of the trial proceedings when it is essential to effective appellate review. The court declared that although there is no constitutional right to appeal, "that is not to say that a State that does grant appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations." Id., 351 U.S. at page 18, 76 S.Ct. at page 590.

Although this holding establishes only the right to a transcript, it indicates the Supreme Court's concern to protect indigent defendants against discriminatory consequences of their poverty. Denial of counsel on appeal would seem to be a discrimination at least as invidious as that condemned in Griffin v. People of State of Illinois, supra. See State v. Delaney, Or., 332 P.2d 71, 74–81; The Effect of Griffin v. People of State of Illinois on the States' Administration of the Criminal Law, 25 U. of Chi.L.Rev. 161, 170–171; Appointment of Counsel for Indigent Defendants in Criminal Appeals, 1959 Duke L.J. 484, 488–489. We need not determine this constitutional question, however, for there are adequate independent grounds for the conclusion that appellate courts must appoint counsel on appeal for all indigent defendants convicted of felonies.

Appointment of counsel is essential to minimize hazards of affirming an erroneous judgment, particularly in view of Rule 33 of the Rules on Appeal. This rule defines "normal record" on appeal and "additional record." If the defendant wants the record on appeal to include matters that are part of the "additional record," he must file "with his notice of appeal an application describing the material which he desires to have included and the points on which he intends to rely which make it proper to include it." It is unreasonable to expect the average indigent defendant without counsel to obtain an adequate record on appeal. He would ordinarily be incarcerated, without access to the trial court's files, and cut off from consultation with his trial defense counsel, the trial judge, the prosecutor, and other witnesses to the trial. He would probably be without access to law books and unable

100 A.L.R. 313, followed, Lee v. Kindelan, 80 R.I. 212, 217–218, 95 A.2d 51, certiorari denied, 345 U.S. 1000, 73 S.Ct. 1146, 1406; Tennessee: State ex rel. Fisher v. Bomar, 201 Tenn. 579, 581, 300 S.W.2d 927; Texas: Spalding v. State, 137 Tex.Cr. 329, 334, 127 S.W.2d 457; cf. State v. Singletary, 187 S.C. 19, 28, 196 S.E. 527.)

to designate points that make it proper to include an additional record. He would probably be unaware of Rule 33, or so unfamiliar with it that he would fail to realize that the normal record does not include rulings on motions, the *voir dire* examination of jurors, the opening statements and arguments to the jury, comments on the evidence by the trial judge, instructions given or refused, and rulings on the admissibility of exhibits. He would not be alert, as would an attorney, to possible reversible errors therein even when they amounted to a denial of constitutional rights. (See People v. Barrett, 207 Cal. 47, 49, 276 P. 1003, [manner in which the trial judge conducted the *voir dire* examination of the jurors amounted to a denial of the constitutional right to trial by jury].)

Even a court cannot make an adequate review on less than the whole record. A fortiori, an attorney called upon by a local bar association and unknown to defendant or trial counsel cannot evaluate the merits of an appeal on less than the whole record. It is unpredictable how far an appellate court would advance toward a determination of the merits of an appeal by ordering the preparation and transmission to it of the whole record. In any event, it would then vitiate Rule 33, designed to avoid preparation and review of nonessential parts of the record.

An appellate court can no more appropriately judge whether there is error requiring reversal without the benefit of counsel than a trial court can decide the issues at the trial without benefit of counsel. See Kopasz v. Kopasz, 34 Cal.2d 423, 425, 210 P.2d 846. How then can it determine that there is no error requiring appointment of counsel? How can it undertake to dispense with counsel for indigents when it is not free to dispense with counsel for those who can afford them? A court does not suddenly become omniscient when the appellant proves impecunious. Thus in People v. Tahtinen, 50 Cal.2d 127, 323 P.2d 442, this court was divided on the merits, yet the attorney to whom the record was referred by the local bar association committee at the instigation of the District Court of Appeal thought there was no reasonable basis for an appeal, and that court accordingly denied defendant's request for appointment of counsel. In the present case that court rejected the attorney's recommendation for appointment of counsel, declaring that the appeal was "without [a] semblance of merit." 3 Cal.Rptr. 203, 205. Yet this court, after ordering a hearing and appointing counsel, now finds that there are substantial legal issues demanding careful research and analysis that demonstrate the risk of fallibility of judgment without benefit of counsel's advocacy.

Moreover, appointment of counsel promotes effective appellate court administration. Denied counsel, defendants frequently file briefs in propria persona raising issues of little or no merit that still require the Attorney General's answer and the court's consideration. Often when a District Court of Appeal affirms the judgment, a defendant files a petition for hearing in this court that does not comply with Rules 28 and 29, which presuppose an orderly presentation of the case before the District Court of Appeal. When a defendant is incapable of making such a presentation, this court has a correspondingly heavy burden in reviewing his petition.

The court as well as defendant is more likely to benefit from oral argument, as well as from briefs presented by counsel rather than by defendant in propria persona. Moreover, the first alternative also avoids possible complications of habeas corpus and the transportation of defendant under guard. There is no reason to forego these advantages of argument by counsel, particularly when the defendant might be driven to the second alternative to secure his right to oral argument on appeal implicit in Rules 22 and 28(f) of the Rules on Appeal. Metropolitan Water Dist. of Southern California v. Adams, 19 Cal.2d 463, 467–468, 122 P.2d 257; see Pen.Code, § 1253; Witkin, New California Rules on Appeal, 17 So.Cal. L.Rev. 232, 243–244.

The problem is not averted merely because Government Code, § 27706 makes it the duty of the public defender to prosecute appeals "where, in his opinion, the appeal will or might reasonably be expected to result in the reversal or modification of the judgment of conviction." Comparable discretion vested in federal district judges is subject to appellate review, and counsel must be appointed to assist the defendant in showing that his appeal has merit. Johnson v. United States, 352 U.S. 565, 566, 77 S.Ct. 550, 1 L.Ed.2d 593; see also Eskridge v. Washington Prison Board, 357 U.S. 214, 78 S.Ct. 1061, 2 L.Ed.2d 1269; Farley v. United States, 354 U.S. 521, 522–523, 77 S. Ct. 1371, 1 L.Ed.2d 1529; see also People v. Kalan, 2 N.Y.2d 278, 159 N.Y.S.2d 480, 140 N.E.2d 357, 358; State ex rel. White v. Hilgemann, 218 Ind. 572, 34 N.E.2d 129, 131. Moreover, it sometimes happens that defendants who were able to retain counsel at the trial are indigent at the time of appeal. It would be capricious to make a defendant's right to appointment of counsel on appeal depend on the chance that he was represented by the public defender at the trial.

In the interest, therefore, of orderly as well as just review an appellate court should appoint counsel upon the request of an indigent defendant convicted of a felony. Any implications to the contrary in People v. Hyde, 51 Cal.2d 152, 154, 331 P.2d 42; People v. Logan, 137 Cal.App.2d 331, 332–333, 290 P.2d 11; People v. McGrory, 137 Cal.App.2d 723, 724, 291 P.2d 43; People v. Hamm, 145 Cal.App.2d 242, 244, 302 P.2d 345; and People v. Slater, 152 Cal.App. 2d 814, 815–816, 313 P.2d 111, should be disapproved.

Of course appointed counsel should not present frivolous appeals. See Ellis v. United States, 356 U.S. 674, 675, 78 S.Ct. 974, 2 L.Ed.2d 1060, discussed in Erenhaft, Indigent Appellants in the Federal Courts, 46 A.B.A.J. 616, 647; State ex rel. White v. Hilgemann, 218 Ind. 572, 578–579, 34 N.E.2d 129. It is for counsel to make a reasonable investigation, ordinarily involving consultation with the defendant, to insure consideration of meritorious grounds of appeal. See United States v. Sevilla, 2 Cir., 174 F.2d 879, 880. Should he then conclude that the appeal is frivolous, he should so advise the court and the defendant. He need not proceed with the appeal; should the defendant insist on proceeding with it, the court need not appoint new counsel. People v. Tabb, 156 Cal.App.2d 467, 471–472, 319 P.2d 656.

The reasons for appointment of counsel on appeal from judgments of conviction do not extend to habeas corpus or other collateral attacks on final judgments of conviction unless the defendant presents a prima facie case for relief. "This procedural requirement does not place upon an indigent prisoner who seeks to raise questions of the denial of fundamental rights in propria persona any burden of complying with technicalities; it simply demands of him a measure of frankness in disclosing his factual situation." In re Swain, 34 Cal.2d 300, 304, 209 P.2d 793, 796. Our reluctance to consider even constitutional questions on habeas corpus if they could have been raised on appeal (see In re Dixon, 41 Cal.2d 756, 759–761, 264 P.2d 513) makes it all the more important to afford defendants a fair opportunity to challenge their convictions on appeal.

Appointment of counsel on appeal should reduce applications for post-conviction remedies in the federal courts as well as our own.[2] As the report of July 5, 1960, of the Habeas Corpus Committee of the National Association of Attorneys General points out, the states can largely obviate review of their decisions in criminal cases by federal district courts on habeas corpus petitions by providing adequate state remedies.

This discussion is limited to felonies because of the substantially less serious nature of misdemeanors and their correspondingly lighter penalties. See Pen.Code, §§ 17–19b.

2. In the two-week period from July 25, 1960 to August 5, 1960, this court denied seven petitions for habeas corpus from the same prisoner, who had taken his appeal in propria persona.

The misdemeanant suffers no loss of civil rights. See Pen.Code, §§ 2600, 2601. He is entitled to bail as a matter of right after conviction pending appeal. Pen.Code, § 1272. Any incarceration is likely to be brief. Frequently a misdemeanant is penalized only by fine, often payable in installments. See Pen.Code, § 1205. The court may grant probation summarily (Pen.Code, § 1203b) to the misdemeanant or permit him to serve time on weekends or at times when he is not working. With earning capacity thus maintained he may be able to employ counsel. Most misdemeanants are willing to forfeit bail or pay the fines and find it unnecessary to employ counsel or request trial. There is hence not the urgency for making appointment of counsel on appeal for indigent misdemeanants mandatory instead of discretionary.

PETERS and DOOLING, JJ., concur.

SCHAUER, Justice (concurring).

I concur only in the judgment. I am impelled to point out that the discussion, in the opinion by the court (at page 817 of 9 Cal.Rptr., at page 1073 of 357 P.2d), of purported interpretation of section 11501 of the Health and Safety Code by the 1953 proposal of legislation, expression of views by an assembly subcommittee, and adoption of section 11503 (former section 11502, enacted in 1953) by the Legislature, is neither necessary nor appropriate. The argument concerning these matters was not advanced either by defendant in pro. per. or by counsel appointed for him, but originated in this court. The notion that these matters which occurred in 1953 could evidence what the Legislature meant when it created the crime of offering to sell a contraband narcotic in 1909 [1] appears to me so obviously lacking in merit as not to warrant inclusion in an appellate opinion; rather, such notion appears to be stated for no other purpose than to refute it.

The contention made by counsel appointed for defendant by this court—that the word "offer" in section 11501 means "attempt" as defined by the law of crimes—is in effect a more sophisticated version of the argument advanced by defendant in pro. per. before the District Court of Appeal, Second District, Division Three. That court, speaking through Presiding Justice Shinn (People v. Brown (1960, Cal.App.), 3 Cal.Rptr. 203, 204, 205), stated defendant's contention as made in pro. per. as follows: "that the word 'offer' should be construed to mean 'bring, bear, or carry,' and since it was not even shown there was a narcotic in existence which could have been the subject of an offer, commission of the charged offense was not proved." Without in so many words rejecting defendant's contention as to the meaning of "offer," the District Court of Appeal correctly held that "Appellant's [defendant's] statement that he had 'it' was sufficient as proof that the heroin was in his possession and that he had the ability to perform his promise."

Now this court, after lengthy consideration of this simple case, comes to the same conclusion as to the sufficiency of the evidence—the only possible conclusion under any normal theory of appellate review. The only contribution to the law in the opinion by the court is the decision that the Legislature, when it proscribed both "offers" and "attempts," referred to two different sorts of criminal conduct.

In the circumstances it is obvious that the District Court of Appeal properly determined, on the basis of its own examination of the record, that "representation by counsel would be of no benefit to the appellant or to the court" and correctly held that "There is no merit in the appeal." (People v.

1. By a 1909 amendment of section 8 of the 1907 Poison Act the Legislature for the first time made it unlawful to "offer to sell, furnish or give away" narcotics except under certain conditions. Stats. 1909, ch. 279, § 4. Since then each of the series of acts which have denounced narcotics offenses has contained a provision similar to that of such amended section 8 or the comparable provision of the here pertinent section 11501 of the Health and Safety Code.

Brown (1960, Cal.App.), supra, 3 Cal.Rptr. 203, 204.)

It seems proper to note that the majority "By the Court" opinion states (at page 816 of 9 Cal.Rptr., at page 1072 of 357 P.2d) that "Defendant requested the District Court of Appeal, Second District, Division Three, in which the appeal was pending, to appoint an attorney to represent him, claiming that he was without funds to employ counsel. The court made an independent investigation of the record, determined that representation by counsel would be of no benefit to defendant or to the court, and denied the request. (See People v. Hyde, 51 Cal.2d 152, 154, 331 P.2d 42.) * * * We granted defendant's petition for hearing in this court and appointed counsel to represent him."

It appears proper to note also that the concurring opinion of Mr. Justice Traynor states (at page 819 of 9 Cal.Rptr., at page 1075 of 357 P.2d), "I concur in the judgment. It is my opinion, however, that the holding in People v. Hyde, 51 Cal.2d 152, 154, 331 P.2d 42, should be expanded to require the appointment of counsel on appeal for all indigent defendants convicted of felonies."

"The question calls for resolution even though we appointed counsel to represent defendant in this court. The question cannot remain in abeyance. This very case illustrates the recurring practice of the District Court of Appeal, Second District, Division Three, of referring the question of the appointment of counsel to the local bar association committee (see People v. Logan, 137 Cal.App.2d 331, 332, 290 P.2d 11) and the consequent countervailing practice of this court to then grant a hearing, even on its own motion, whenever there has been no appointment of counsel. There would be no end to such wasteful procedure were the question deemed moot each time this court granted a hearing and appointed counsel. The question should be settled in the interest of effective appellate court administration."

It seems appropriate further to note that the question *was settled* by the holding in People v. Hyde (1958), 51 Cal.2d 152, 154 [1], 331 P.2d 42 and that the District Court of Appeal in the present case complied with that holding.

From what has been quoted above from the opinions of the majority and of Justice Traynor it appears proper to infer that the granting of a hearing in the case at bench was influenced at least in part by the view of the specially concurring justice. If such inference is properly drawn it seems obviously appropriate to observe that although counsel appointed by this court performed his duties faithfully and ably, the appointment of an attorney for the defendant has not aided such defendant or furthered the proper administration of justice. The only thing which the granting of a hearing accomplished has been a delay in final determination of this case and additional expense to the state.

McCOMB, J., concurs.

In re Larry Wayne McLAIN, on Habeas Corpus.

Cr. 6714.

Supreme Court of California, In Bank.

Dec. 27, 1960.

Rehearing Denied Jan. 25, 1961.

Proceeding on habeas corpus by state prisoner claiming that he is being illegally retained. The Supreme Court, Peters, J., held that where Adult Authority had previously fixed prisoner's term at 7 years and granted probation at a time to commence in future but subsequently revoked prior action because based on record before Authority prisoner had been found guilty of complicity in knifing of fellow prisoner, good cause was shown for revocation of both parole and prior sentence, and such sentence until Authority fixed it at a lesser

APPENDIX "C"

Note 48

cumstances have been futile in prosecution for possession of heroin for sale and possession of marijuana. People v. Zavala (1966) 49 Cal.Rptr. 129, 239 C.A.2d 732.

Even though defendant, who pleaded guilty to crime of possessing heroin, stipulated that court could determine at time of probation and sentence hearing whether possession admitted by defendant was for purpose of sale, it was improper for court, apparently acting upon material contained in probation report, to "find" defendant guilty of more serious crime of possession for purposes of sale. People v. Bravo (1965) 46 Cal.Rptr. 921, 237 C.A.2d 459.

Refusal to permit defendants to controvert facts relied upon by prosecution to justify issuance of search warrant used to obtain incriminating evidence used against defendants in prosecution for possessing heroin for sale was error requiring reversal. People v. Peterson (1965) 43 Cal.Rptr. 157, 233 C.A.2d 481.

Police officer's reference in presence of jury to sale of narcotics by defendant charged with possessing narcotics was not prejudicial and did not deny defendant fair trial in view of facts that defense first elicited reference to selling narcotics from officer and then pursued the subject. People v. Estrada (1965) 44 Cal.Rptr. 165, 234 C.A.2d 136, 11 A.L.R.3d 1307.

§ 11352. Transportation, sale, giving away, etc. of designated controlled substances; punishment; prior convictions

(a) Except as otherwise provided in this division, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport (1) any controlled substance specified in subdivision (b) or (c) of Section 11054, specified in paragraph (11), (12), or (17) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment in the state prison for a period of five years to life and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than three years in the state prison.

(b) If such person has been previously convicted once of any offense described in subdivision (d), the previous conviction shall be charged in the indictment or information and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, he shall be imprisoned in the state prison for a period of 10 years to life and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than 10 years in the state prison.

(c) If such person has been previously convicted two or more times of any offense described in subdivision (d), the previous convictions shall be charged in the indictment or information and, if found to be true by the jury upon a jury trial or by the court upon a court trial or if admitted by the person, he shall be imprisoned in the state

prison for a period of 15 years to life and shall not be eligible for release upon completion of sentence or on parole or any other basis until he has been imprisoned for a period of not less than 15 years in the state prison.

(d) Any previous conviction of any of the following offenses, or of an offense under the laws of another state or of the United States which, if committed in this state, would have been punishable as such an offense, shall be charged pursuant to subdivision (b) or (c) of this section:

(1) Any felony offense described in Section 11378, 11379, or 11380.

(2) Any felony offense described in this division involving a controlled substance specified in subdivision (b) or (c) of Section 11054, specified in paragraph (10), (11), (12), or (17) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055.

(3) Any felony offense described in this division involving a narcotic drug classified in Schedule III, IV, or V.

(Added by Stats.1972, c. 1407, p. 3013, § 3. Amended by Stats.1973, c. 1078, p. 2173, § 4, eff. Oct. 1, 1973.)

Historical Note

Resentencing for violations between March 7, 1973, and October 1, 1973, see note under section 11350.

The 1973 amendment designated subds. (a) to (c) and conditions (1) and (2) of subd. (a); inserted in subd. (a)(1) the words "specified in subdivision (b) or (c) of section 11501, specified in paragraph (11), (12) or (17) of subdivision (d) of section 11054, or specified in subdivision (b) or (c) of section 11055, or"; substituted, at the beginning of subd. (a)(2), the words "any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless" for the words "classified in Schedule I or II, other than marijuana, except"; substituted in subds. (b) and (c), the words "any offense described in subdivision (d)" for the words "any felony described in this division or of any offense under the laws of any other state or the United States which, if committed in this state, would have been punishable as a felony offense described in this division"; and, added subd. (d).

Derivation: Former section 11501, added by Stats.1959, c. 1112, p. 3193, § 1, amended by Stats.1961, c. 215, p. 1234, § 39; Stats.1961, c. 274, p. 1303, § 3.

Provisions relating to transportation and sale of narcotics were formerly contained in section 11160, added by Stats. 1939, c. 60, p. 758, § 11160, amended by Stats.1940, 1st Ex.Sess., c. 9, p. 18; Stats.1941, c. 1116, p. 2820, § 5. Renumbered § 11500 and amended Stats.1945, c. 955, p. 1840, § 8; Stats.1955, c. 1466, p. 2675, § 1.

Former section 11713, which provided punishment for transporting, selling, furnishing, administering or giving away any narcotic or for offering to do any of such acts, enacted Stats.1939, c. 60, p. 771, § 11713, amended Stats.1940, 1st Ex.Sess. c. 9, p. 24, § 38; Stats.1945, c. 955, p. 1841, § 35; Stats.1953, c. 1770, p. 3526, § 7; Stats.1951, 1st Ex.Sess. c. 12, p. 259, § 1; Stats.1929, c. 216, p. 358, § 6; Stats. 1935, c. 813, p. 2207, § 5b.

Former section 11912, added by Stats. 1965, c. 2030, p. 4601, § 1, amended by Stats.1969, c. 403, p. 936, § 2; Stats.1970, c. 1098, p. 1955, § 16.

Cross References

Arrest of alien for violation of this section, notice to federal agency, see § 11369.

Conviction of alien, notice to federal agency, see § 11465.

Dangerous drug violations, effect of prior conviction under this section, see § 11378 et seq.

Driving privilege, revocation on conviction of violation of this section, see Vehicle Code § 13202.

APPENDIX "D"

§ 11355. Sale or furnishing substance falsely represented to be a controlled substance; punishment

Every person who agrees, consents, or in any manner offers to unlawfully sell, furnish, transport, administer, or give (1) any controlled substance specified in subdivision (b) or (c) of Section 11054, specified in paragraph (10), (11), (12), or (17) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055 or, (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug to any person, or offers, arranges, or negotiates to have any such controlled substance unlawfully sold, delivered, transported, furnished, administered, or given to any person and then sells, delivers, furnishes, transports, administers, or gives, or offers, arranges, or negotiates to have sold, delivered, transported, furnished, administered, or given to any person any other liquid, substance, or material in lieu of any such controlled substance shall be punished by imprisonment in the county jail for not more than one year, or in the state prison for not more than 10 years.

(Added by Stats.1972, c. 1407, p. 3014, § 3. Amended by Stats.1973, c. 1078, p. 2176, § 7, eff. Oct. 1, 1973).

Historical Note

The 1973 amendment designated conditions (1) and (2); inserted in the first condition the words "specified in subdivision (b) or (c) of section 11054 or specified in subdivision in paragraph (10), (11), (12) or (17) of subdivision (d) of section 11054, or specified in subdivision (b) or (c) of section 11055 or,"; substituted the words "any controlled substance classified in Schedule III, IV, or V which is a narcotic drug to any person, or offers, arranges, or negotiates to have any such controlled substance" for "any controlled substance classified in Schedule I or II to any person, or offers, arranges, or negotiates to have any controlled substance classified in Schedule I or II" at the beginning of condition (2); and, substituted the words "such controlled substance" for the words "any controlled substance classified in Schedule I or II" near the end of the second condition.

Resentencing for violations between March 7, 1973, and October 1, 1973, see Historical Note under section 11350.

Derivation: Former section 11503, added by Stats.1959, c. 1112, p. 3194, § 6.

Cross References

Arrest of alien for violation of this section, notice to federal agency, see § 11369.
Conviction of aliens, notice to federal agency, see § 11369.
Denial of probation or suspension of sentence after conviction of violation of this section, prior conviction of certain offenses, see § 11370.
Expenditures to secure evidence, see § 11454.
Fine in addition to imprisonment for conviction of violation of this section, see § 11372.
Narcotics offense defined as violation of this section for purposes of Education Code, see Education Code § 12912.5.
Probation or suspension of sentence, previous convictions, see § 11370.
Recovery of funds expended in investigations, see § 11501.
Registration as controlled substance offender, conviction of offense defined in this section, see § 11590 et seq.
School employees, notice to school authorities upon arrest for violation of this section, see § 11591.

Library References

Drugs and Narcotics ⇨68, 133.

C.J.S. Drugs and Narcotics §§ 164, 165, 167, 168, 173, 225 to 229.

APPENDIX "E"

(c) For a third or subsequent offense, or if the offender has previously been convicted two or more times of violating this section or of any offense under the laws of the United States or any state, territory or district which, if committed in this state, would amount to a violation of this section, by imprisonment in the state prison for life or for a definite period of not less than 5 years nor more than 20 years and may be further punished by a fine of not more than $10,000 for each offense.

5. The court shall not grant probation to or suspend the sentence of any person convicted under subsection 4 and punishable pursuant to paragraph (b) or (c) of subsection 4.

(Added to NRS by 1971, 2018; A 1973, 1213, 1372; 1977, 1411)

453.323 Offenses and penalties: Prohibited acts "C"; penalties.

1. Any person who offers, agrees or arranges unlawfully to sell, supply, transport, deliver, give or administer any controlled substance classified in NRS 453.161 or 453.171 and then sells, supplies, transports, delivers, gives or administers any other substance in place of such controlled substance shall be punished by imprisonment in the county jail for not more than 1 year or in the state prison for not less than 1 year nor more than 10 years and may be further punished by a fine of not more than $10,000 for each offense.

2. The court shall not grant probation to or suspend the sentence of any person convicted of violating subsection 1 if he has previously been convicted of any felony offense under the Uniform Controlled Substances Act or of any offense under the laws of the United States or any state, territory or district which, if committed in this state, would amount to a felony under the Uniform Controlled Substances Act.

3. Any person who offers, agrees or arranges unlawfully to sell, supply, transport, deliver, give or administer any controlled substance classified in NRS 453.181, 453.191 or 453.201 and then sells, supplies, transports, delivers, gives or administers any other substance in place of such controlled substance shall be punished by imprisonment in the county jail for not more than 1 year or in the state prison for not less than 1 year nor more than 6 years and may be further punished by a fine of not more than $5,000 for each offense.

(Added to NRS by 1977, 1408)

453.326 Offenses and penalties: Prohibited acts "D"; penalties.

1. It is unlawful for any person:

(a) To refuse or fail to make, keep or furnish any record, notification, order form, statement, invoice or information required under the provisions of NRS 453.011 to 453.551, inclusive; or

(b) To refuse an entry into any premises for any inspection authorized by the provisions of NRS 453.011 to 453.551, inclusive; or

(c) Knowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft or other structure or place which is resorted to by persons using controlled substances in violation of the provisions of NRS 453.011 to 453.551, inclusive, for the purpose of using these substances, or which is used for keeping or selling them in violation of such sections.

APPENDIX "F"

In the Fourth Judicial District Court

of the State of Utah
In and For Utah County

THE STATE OF UTAH, **Plaintiff**

vs.

GARY DALE JACOBSEN, **Defendant**

MINUTE ENTRY

CASE NUMBER 7062

DATED August 25, 1978

J. Robert Bullock, **JUDGE**

RULING

Having heard the arguments of counsel and having read and considered the memoranda filed herein, the Court now orders that the Information be quashed upon the ground and for the reason that it does not allege an offense.

The Court is of the opinion that an offense occurs under Section 58-37-8 (1) (a) (iv) U.C.A., 1953 as amended, if and only if a particular controlled substance is arranged to be sold, and that some other substance is substituted in lieu thereof.

cc: Noall T. Wootton
Gregory M. Warner